(2) Court, U.S.
FILED
03154 1 MAR 17 2004
OFFICE OF THE CLERK

Nos. _____ and _____

In The
Supreme Court of the United States

In re DONALD C. FLEMING and WILLIAM ALLEN ARNOLD,
Defendants-Appellants-Petitioners,
PRO SE, NO ATTORNEYS,
ASSERTING A RIGHT OF
SELF-REPRESENTATION

DONALD C. FLEMING and WILLIAM ALLEN ARNOLD,
Defendants-Appellants-Petitioners,
PRO SE, NO ATTORNEYS,
ASSERTING A RIGHT OF
SELF-REPRESENTATION
v.
UNITED STATES OF AMERICA,
Plaintiff-Appellee-Respondent

ON PETITION FOR WRIT OF MANDAMUS AND
ON RULE 11 PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX A (DONALD C. FLEMING)

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Rule 14(i)(i)

Order 15 December 2003 Opinion (and Order)

FILED
U.S. COURT OF APPEALS ELEVENTH CIRCUIT
DEC 15 2003
THOMAS K. KAHN CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12283

District Court Docket No. 00-00262-CR-J-20-HTS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD C. FLEMING,

Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Florida

ORDER

Counsel in this direct criminal appeal has moved to withdraw and filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). An attorney who finds an appeal "wholly frivolous" and seeks to [p. 2] withdraw from further representation must nevertheless remain in "the role of an active advocate on behalf of his client." Anders, 386 U.S. at 744, 87 S.Ct. at 1400. Thus, counsel seeking to withdraw from further representation based upon the belief that an appeal is wholly frivolous must accompany the motion to withdraw with a brief that "set[s] out any irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another

counselor or the court, be arguably meritorious." United States v. Blackwell, 767 F.2d 1486, 1487-88 (11th Cir. 1985) (emphasis in original). Counsel must conduct a "conscientious examination" of the entire record on appeal. Penson v. Ohio, 488 U.S. 75, 80, 109 S.Ct. 346, 350, 102 L.Ed.2d 300 (1988). Counsel then must isolate the pages of the record relevant to those arguably meritorious points and cite relevant legal authority. United States v. Edwards, 822 F.2d 1012, 1013 (11th Cir. 1987). We, after plenary review of the record, must determine independently whether the case is wholly frivolous. Anders, 386 U.S. at 744, 87 S.Ct. at 1400

In his brief, counsel briefly relates some of the district court proceedings and discusses briefly the taking of Fleming's plea and why counsel believes there is no arguable issue related to the plea. Counsel mentions only in passing the fact that Fleming was proceeding pro se at the plea and does not discuss at all why [p. 3] there are no issues of arguable merit related to, among other things, Fleming's self-representation, the denial of Fleming's motion to suppress, and Fleming's sentence. This list of potential errors arises from a cursory review of the record and is not intended as exhaustive, but it does establish that counsel has not detailed all of the potential sources of error arising in the trial process that, "although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court, be arguably meritorious." See Blackwell, 767 F.2d at 1487-88. Furthermore, our review indicates that the transcripts of six hearings are missing from the record on appeal and the transcription of a seventh hearing is incomplete. On this record, counsel, who does not appear to have been present at most of those hearings, cannot accurately state that he has conducted a conscientious examination of the entire record nor can we conduct the required plenary review.

Accordingly, we deny, without prejudice, counsel's motion to withdraw and direct him to supplement the record with complete transcriptions of:

(1) the August 15, 2000 hearing;
(2) the March 23, 2001 hearing;
(3) the March 27, 2001 hearing;
(4) the April 30, 2001 hearing; [p. 4]
(5) the May 24, 2002 hearing;
(6) the March 21, 2003 hearing; and
(7) the March 25, 2003 hearing.

Upon completion of the record, counsel may then submit a merits brief or renew his Anders motion with a conforming brief. Should counsel elect to renew his motion under Anders, he is hereby DIRECTED to address all irregularities and potential errors that might arguably support reversal, isolating the pages of the record relevant to the issue and citing appropriate, relevant legal authority.

DENIED, WITHOUT PREJUDICE.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

Rule 14(i)(ii)

Additional relevant opinions, orders (Clerk's actions), and etc.

28 April 2003 Final Judgment at trial

AO 245B (3/01 Rev. locally 9/01)
Sheet 1 - Judgment in a Criminal Case

FILED 2003 APR 28 P 4:19
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION
JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA
v.
DONALD C. FLEMING

CASE NO. 3:00-cr-262-J-20HTS
Defendant's Attorney:
James A. Hernandez, Esq. (cja)

THE DEFENDANT:
X pleaded guilty to Count One of the Indictment.
__ pleaded nolo contendere to count(s) which was accepted by the court.
__ was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

TITLE & SECTION	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT NUMBER(S)
18 U.S.C. 371	Conspiracy to defraud the United States Department of Treasury for the purpose of impeding or obstructing the Internal Revenue Service.	November 1999	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

__ The defendant has been found not guilty on count(s)
X Counts Two through Ten and Fifteen of the Indictment are dismissed pursuant to the Plea Agreement.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 077-34-4383
Defendant's Date of Birth: February 6, 1943
Date of Imposition of Sentence: April 28, 2003
Defendant's USM No.: 21483-018
Defendant's Mailing Address: 1012 Crestdale St., Jacksonville, FL 32211
Defendant's Residence Address: 1012 Crestdale St., Jacksonville, FL 32211

CERTIFIED A TRUE COPY
SHERYL L LOESCH. CLERK /s/ Harvey Schlesinger
U. S. DISTRICT COURT HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

By: /s/
Deputy Clerk DATE: April 28 2003
( ) COPIES DISTRIBUTED
SCANNED 1222

3:00cr00262 #1222 Page 1/7

AO 245B (3/01 Rev. locally 9/01)
Sheet 2 - Imprisonment
Defendant: DONALD C. FLEMING Judgment-Page 2 of 6
Case No.: 3:00-cr-262-J-20HTS

IMPRISONMENT

The defendant is hereby committed to the custody of

the United States Bureau of Prisons to be imprisoned for a term of **27 months**.

_X_ The court makes the following recommendations to the Bureau of Prisons: an institution as close as possible to Jacksonville, Florida.

_X_ The defendant is remanded to the custody of the United States Marshal.

_ The defendant shall surrender to the United States Marshal for this district.
_ at _ a.m./p.m. on _
_ as notified by the United States Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
_ before 2 p.m. on _
_ as notified by the United States Marshal.
_ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:
___[blank]_____

Defendant delivered on ___ to _____ at _____ ___, with a certified copy of this judgment.

_____
United States Marshal

By:_____
Deputy Marshal

3:00cr00262 #1222 Page 2/7

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime, and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instruction of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
14) if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in

the Criminal Monetary Penalties sheet of this judgment.

AO 245B (3/01 Rev. locally 9/01)
Sheet 3a - Supervised Release
Defendant: DONALD C. FLEMING Judgment-Page 4 of 6
Case No.: 3:00-cr-262-J-20HTS

SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

_ The defendant shall participate in the Home Detention program for a period of _. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by the defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such monitoring not to exceed an amount determined reasonable by the Probation Officer based on ability to pay (or availability of third party payment) and in conformance with the Probation Office's Sliding Scale for Electronic Monitoring Services.

_ The defendant shall participate as directed in an in-patient or out-patient program approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency which will include testing for the detection of substance use or abuse.

Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Substance Abuse Treatment Services.

_ The defendant shall participate as directed in a program of mental health treatment approved by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable to by Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Mental Health Treatment Services.

_ If deported by the Immigration and Naturalization Service, the Defendant shall not re-enter the United States unless allowed to do so legally.

_ Defendant shall provide the Probation Officer access to any requested financial information.

_ Defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or obligating for any major purchases without approval of the Probation Officer.

_ Defendant shall perform _ hours of community service as directed by the Probation Officer.

_ Defendant shall submit to a search of his/her person, residence, place of business, or vehicle conducted by the Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be

grounds for revocation; defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

X Defendant shall agree to undertake payment of all taxes, interest, and penalties found to be lawfully owed and due to the Internal Revenue Service with regard to both personal income taxes and all taxes due and owing from the operation of the various businesses the defendant controlled for, among others, the years 1993, 1994, 1995, and 1996, and to cooperate with and provide to the Internal Revenue Service any documentation necessary for a correct computation of all taxes due and owing for those years, including, if necessary, the filing of amended tax returns for said years.

AO 245B (3/01 Rev locally 9/01)
Sheet 5, Part A - Criminal Monetary Penalties
Defendant: DONALD C. FLEMING Judgment-Page 5 of 6
Case No.: 3:00-cr-262-J-20HTS

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B. The defendant shall pay interest on any fine or restitution of more than $2,500 unless the fine or restitution is paid in full before the fifteenth day after the date of Judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

	Assessment	Fine	Total Restitution
Totals:	**$100.00**		

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

_ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

_ The interest requirement is waived.

_ The interest requirement is modified as follows:

RESTITUTION

_ The determination of restitution is deferred until _. An Amended Judgment in a Criminal Case will be entered after such a determination. The U.S. Attorneys Office is directed to provide the necessary information to the court.

_ The defendant shall make restitution to the following victims in the amounts listed below:

_ Restitution is ordered jointly and severally with:

Name of Payee	**Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order or Percentage of Payment**
Totals:	$		

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability until this obligation is satisfied. While in custody the defendant is directed to participate in the Bureau of Prisons' Financial Responsibility Program if eligible and upon release from custody the defendant shall adhere to a payment schedule as determined by the Probation Office.

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability. While in custody the defendant is directed to participate in the Bureau of Prisons' Financial

Responsibility Program if eligible and upon release from custody the defendant shall make nominal payments as determined by the Probation Office.

__ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability until this obligation is satisfied. While on supervision the defendant shall adhere to a payment schedule as determined by the Probation Office.

__ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability. While on supervision the defendant shall make nominal payments as determined by the Probation Office.

__ The defendant is ordered to immediately pay this obligation in full.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column above.

The amount of loss and the amount of restitution ordered will be the same unless, pursuant to 18 U. S.C. §3664(f)(3)(B), the court orders nominal payments and this is reflected on Sheet 6, Statement of Reasons.

AO 245B (3/01 Rev. locally 9/01)
Sheet 5 Part B - Criminal Monetary Penalties
Defendant: DONALD C. FLEMING Judgment-Page 6 of 6
Case No.: 3:00-cr-262-J-20HTS

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) non-federal restitution; (3) federal

restitution; (4) fine principal; (5) costs; (6) interest; (7) penalties.

Payment of the total criminal monetary penalties shall be due as follows:

I. X In full
   A. X due immediately
   B. _ on or before ___.

II. _ In installments
   A. _ monthly in installments of $ over a period of _ months, to commence _ days after date of this judgment.
   B. _ in installments of $ over a period of _ to commence _ days after the date of this judgment.

Any payment ordered under Part II, must comply with 18 U.S.C. §3572, 18 U.S.C. §3664(n), and include a provision under 18 U.S.C. §3664(k) in which defendant must notify the court of any material changes in defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. §3664(f)(3)(A): [blank]

In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

_ The defendant shall forfeit the defendant's interest in the following property to the United States: [blank]

If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary

penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the court.

3:00cr00262 #1222 Page 6/7

FILE COPY

Date Printed: 04/29/2003
Notice sent to:

✓ A. William Mackie, Esq. and Troy Sellers
U.S. Attorney's Office
Middle District of Florida
300 N. Hogan Street, Suite 700
P.O. Box 600
Jacksonville, FL 32201

✓ James A. Hernandez, Esq.
Hernandez & Hernandez
1905 Atlantic Blvd.
Jacksonville, FL 32207-3405

3:00cr00262 #1222 Page 7/7

1 May 2003 (Approximate date) Information regarding the Transcript Information Form

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Office of the Clerk
300 North Hogan Street
Suite 9-150
Jacksonville, Florida 32202
(904) 549-1900
www.flmd.uscourts.gov

Sheryl L. Loesch, Clerk
Eric A. Hogue, Jacksonville Division Manager

NOTICE TO COUNSEL OR PRO SE PARTY RE: PREPARATION OF 11th CIRCUIT TRANSCRIPT INFORMATION FORM

The Clerk's Office has recently received your Notice of Appeal. Enclosed is an 11th Circuit Transcript Information Form which will serve as a purchase order for transcript(s). A separate Transcript Information Form should be filed for each court reporter involved in this case.

Part I of the Transcript Information Form should be completed and the yellow copy filed with the District Court Clerk's Office, 311 W. Monroe St., Room 110, Jacksonville, FL 32202, within 10 days of the filing of the notice of appeal. This form should be completed for all cases, including those in which there was no hearing or for which no transcript is needed.

The pink and green copies are to be sent to the appropriate court reporters) if transcripts are being ordered. A photocopy of the form should be sent to the Clerk of the U. S. Court of Appeals for the 11th Circuit at 56 Forsyth Street, N.W., Atlanta, GA 30303 and to all parties.

SHERYL L. LOESCH, CLERK OF COURT

27 May 2003 Fleming's confirmation of intent to proceed without counsel. Dated the 16th, but not received until 27 May 2003.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

May 16, 2003
[handwritten note] Rcvd by [DCF] 5-27-03 [initials DF]
Donald C. Fleming (#21483-018
Duval County Jail
500 E ADAMS ST.
JACKSONVILLE FL 32202-2813

RE: 03-12283-D USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

Unless you elect to proceed without counsel or are financially able to obtain counsel, the court may appoint counsel to represent you in this appeal from your judgment of conviction. Please answer the following questions:

1. Do you elect to proceed without counsel?
   ANSWER: YES
2. Are you financially able to obtain counsel?
   ANSWER: N/A
3. Do you wish the court to appoint counsel to represent you in this appeal?
   ANSWER: N/A

IF THE ANSWER TO NUMBER 3 IS YES, PLEASE FILL IN AND RETURN THE ENCLOSED MOTION TO PROCEED IN FORMA PAUPERIS AND FINANCIAL AFFIDAVIT.
After answering 1 of the above questions, please sign in the space provided below and return this letter promptly.

SIGNATURE: /s/ Don Fleming

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Nancy Holbrook/wl/404-335-6183

Counsel for appellant must file the enclosed Certificate of

Interested Persons with this Court within the provided response time.
Encl.

APPT-1 (1-1999)

6 June 2003 Clerk's action–Returning unfiled Fleming's Brief and Appendix. (*See* Arnold's Exhibit 2 (on appeal))

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

June 6, 2003

Don Fleming
1012 Crestdale Street
Jacksonville, Florida 32211

RE: Briefs and Appendix received 06/02/03

(X) The papers you recently submitted to this office are being returned for the reasons stated.:

You have court appointed counsel.

Sincerely,
THOMAS K. KAHN, CLERK
By Debbie Cordell
Supervisor-Brief/Case closing

wl/Pro-1
enc.

24 June 2003 Clerk's transmittal document accompanying Order

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

June 24, 2003

MEMORANDUM TO COUNSEL OR PARTIES

RE: 03-12283-D USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

COUNSEL MUST COMPLETE AND FILE THE ENCLOSED TRANSCRIPT ORDER FORM WITHIN 14 DAYS FROM THE DATE OF THIS LETTER.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Nancy Holbrook /scw (404)335-6183
MOT-2 (3-2003)

24 June 2003 Order–Denying appointed counsel's first motion to withdraw

FILED
U.S. COURT OF APPEALS ELEVENTH CIRCUIT
JUN 24 2003
THOMAS K. KAHN CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12283-D

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD C. FLEMING,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

---

O R D E R:

The motion to withdraw as appointed counsel for Appellant, filed by attorney James A. Hernandez, is DENIED WITHOUT PREJUDICE TO RENEWAL subject to counsel['s] filing a motion to withdraw and brief in compliance with Anders v. California, 386 U.S. 738 (1967).

Appellant's request to proceed pro se is DENIED AS MOOT.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

27 June 2003 Clerk's action–Returning unfiled Fleming's Declaration and Motion, etc. regarding termination of *in forma pauperis*

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

June 27, 2003

Donald C. Fleming (#21483-018)
Baker Co. Detention Ctr.
56 N. 2nd St.
Macclenny FL 32063

RE: 03-12283-D USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

I am returning to you unfiled the pro se papers which you have submitted. Because you are represented by counsel, the rules of this court do not allow us to accept these papers from you. See 11th Cir. R. 25-1 and 11th Cir. R. 28-3. We suggest that you communicate with your attorney concerning issues or arguments which you believe should be presented to the court.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Nancy Holbrook /scw (404)335-6183

Encl.

PRO-3 (8-2000)

26 June 2003 Subject document (the enclosure) of immediately preceding Clerk's action

FILED
U.S. COURT OF APPEALS
RECEIVED CLERK
26 JUN 2003
ATLANTA, GA.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12283 D

Don Fleming,
Appellant
v.
UNITED STATES OF AMERICA,
Appellee

On appeal from the trial court, the
UNITED STATES DISTRICT COURT,
for the MIDDLE DISTRICT OF FLORIDA
Transaction No. 3:00-cr-262-J-20HTS

FLEMING'S DECLARATION
(and Alternate Declaration)
OF TERMINATION OF IN FORMA PAUPERIS
CAPACITY AND STATUS
(including, in the alternative, his)
MOTION TO BE DISPAUPERED
(plus his)
MOTION FOR EXTENSION OF TIME
TO FILE BRIEF

[p. 2] **Declaration**

In the event my Affidavit of 22 April 2003 did not specify clearly enough this intent and purpose, I reiterate and declare the termination of my *in forma pauperis* capacity and status. Recognition of this change intends to apply *nunc pro tunc* to the date of the Affidavit, namely 22 April 2003.

Alternate Declaration

As already confessed in my Affidavit, I had no idea that the "federal income tax system" was based upon a fiduciary obligation. Therefore, I had no idea of the mistake of fact I was making regarding the property interests involved in the matter. To continue with confessions of my learning in this process, and to acknowledge yet another mistake of law that has caused another mistake of fact, I have found the following

definition that applies to my present circumstance.

> FORMA PAUPERIS, English law. When a person is so poor that he cannot bear the charges of suing at law or in equity, upon making oath that he is not worth five pounds, and bringing a certificate from a counselor at law, that he believes him to have a just cause, he is permitted to sue in forma pauperis, in the manner of a pauper; that is, he is allowed to have original writs and subpoenas gratis, and counsel assigned him without fee. 3 Bl. Com. 400. See 3 John. Ch. R. 65; 1 Paige, R. 588; 3 Paige, R. 273; 5 Paige, R. 58; 2 Moll. R. 475; 1 Beat. R. 54.

BOUVIER'S LAW DICTIONARY (rev. 6th ed. 1856).

[p. 3] Given that this (alternate) standard is five pounds British Sterling, and that I had no idea before that this was the standard, I hereby declare that I am worth at least this five pounds British Sterling, that I have been worth at least five pounds British Sterling from 21 April 2003 to date, and, that I, thereby, no longer qualify as a pauper, under this standard, *nunc pro tunc* to 21 April 2003.

In the Alternative, his MOTION TO BE DISPAUPERED

Motion

Fleming moves that the court dispauper him, or else declare him not guilty.

Basis

> TO DISPAUPER, Eng. law. To deprive a person of the privilege of suing in forma pauperis. (q. v.)
>
> 2. When a person has been admitted to sue in forma pauperis, and, before the suit is ended, it appears that

> the party has become the owner of a sufficient estate real or personal, or has been guilty of some wrong, he may be dispaupered.

BOUVIER'S LAW DICTIONARY (rev. 6th ed. 1856).

Discussion

If my Affidavit didn't bring into effect the dispaupering, and if the above declaration doesn't clarify the Affidavit, then this motion is presented. Either the [p. 4] "system's" determination of a mere "appearance" "guilt" against me instantly and at that moment dispaupered me for the remainder of these proceedings, or else there's a matter of discretion in the hands of the administrative trustee being used for something other than my *benefit*. The only remaining alternative is that the "system" is heralding to the world that there is not even an appearance of guilt.

Recognizing that the options of analysis in this are limited to these three choices, we need to determine which is active.

Request for Relief

Fleming respectfully requests that the court either acknowledge the Affidavit, acknowledge the Declaration(s) presented here, or dispauper him by granting his Motion. Alternatively, declare the absence of his guilt.

MOTION FOR EXTENSION OF TIME

Due to the approaching shortness of time for filing the principal brief, originally submitted on or about 2 June 2003, but returned for lack of signature authority, as a direct result from this in forma pauperis issue, Fleming requests that the court issue the following rule regarding the filing deadline for his brief:

> Fleming's principal brief shall be considered timely filed if filed within 10 days following his receipt in

hand of the Order of this court allowing him to [p. 5] proceed by speaking on his own behalf.

The declarations and the motions are all

Respectfully submitted,

Don Fleming
1012 Crestdale Street
Jacksonville
Florida [32211]

Verification

In the event I have no access to a notary, I assert the following:

Noting that "this state" is estopped from asserting otherwise, via its confession at 28 U.S.C. § 1746, and genuinely not knowing whether I am, at the present time, executing this statement within "this state" (its territories, possessions or commonwealth) (a/k/a the United States) or outside of it, and while preferring to remain outside of it, but in whichever "location" this may be deemed executed, I hereby declare (or certify, verify or state), under the penalty of perjury, as may be defined by the law recognized by this forum, that the above and foregoing Declaration, Alternate Declaration, and all facts asserted for purposes of the both Motions are statements of facts that are true and correct, regarding which [p. 6] I have personal knowledge, and regarding which I am competent to make this Affidavit.

_____
Don Fleming
Affiant, Declarant

Date of signing: _____
[handwritten note] 6-26-03
[handwritten note] M-6-27-03

In the event I do have access to a notary, there's this.

Before me, the Undersigned Notary, personally appeared Don Fleming, who, upon satisfactory identification shown to me, and upon oath administered by me, deposed and stated as follows:

1. I am Don Fleming, a resident of the State of Florida, domiciled in the County of Duval.
2. I am at least 21 years of age. I have personal knowledge of these facts, which facts are true and correct, and I am competent to make this Affidavit.
3. The above and foregoing Declaration, Alternate Declaration, and all facts asserted for purposes of the both Motions are statements of facts that are true and correct.

Further, Affiant sayeth not.

[p. 7]

_____
Don Fleming
Affiant, Declarant

Date of signing: _____

_____
Signature of Notary Public (SEAL)

(Only if not visible in SEAL:)
Printed Name: _____
My Commission Expires: _____

Certificate of Service

By my signature below, I certify that I have served, or caused to be served, either by first class mail or hand delivery, a copy of this Document on the following:

Susan Raab [handwritten note] Mailed 6/25
Assistant United States Attorney
300 North Hogan Street, Suite 700
Jacksonville, Florida 32201

James Hernandez [handwritten note] Faxed 6/24
Hernandez & Hernandez
1905 Atlantic Boulevard
Jacksonville, Florida 32207

Don Fleming

8 July 2003 Clerk's transmittal document accompanying Order

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

July 08, 2003

MEMORANDUM TO COUNSEL OR PARTIES

RE: 03-12283-D USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

ENCLOSED TO APPELLANT IS THE 6/27/03 PRO-3 LETTER THAT WAS RETURNED (APPELLANT'S ADDRESS HAS CHANGED).

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Nancy Holbrook /wl/404-335-6183

MOT-2 (3-2003)

8 July 2003 Order–Denying Flemings Declaration and Motion, etc. regarding termination of *in forma pauperis*

FILED
U.S. COURT OF APPEALS ELEVENTH CIRCUIT
JUL - 8 2003
THOMAS K. KAHN CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12283-D

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD C. FLEMING,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

---

O R D E R:

The "Declaration (and Alternate Declaration of Termination) of In Forma Pauperis Status...," filed by Appellant himself and construed as a motion to revoke his in forma pauperis status, to discharge his appointed counsel, to proceed pro se, and for other relief, is before the Court. The motion is DENIED in its entirety Appellant's counsel is reminded that he remains counsel Appellant.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

22 August 2003 (Supplement) Record of Clerk's action–Returning unfiled Fleming's Notice of Waiver of Right to Counsel, etc.

The document that follows, while filestamped, is not of Record in the Eleventh Circuit. It was returned as unfiled as of 22 August 2003.

18 August 2003 Subject document of immediately preceding Clerk's action

U.S. COURT OF APPEALS
RECEIVED CLERK
AUG 18 2003
ATLANTA, GA.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12283 D

UNITED STATES OF AMERICA,
Plaintiff–Appellee,
v.
Don Fleming,
Defendant–Appellant

On appeal from the trial court, the
UNITED STATES DISTRICT COURT,
for the MIDDLE DISTRICT OF FLORIDA
Transaction No. 3:00-cr-262-J-20HTS

FLEMING'S NOTICE OF WAIVER OF RIGHT TO COUNSEL ON APPEAL and accompanying alternative MOTION TO ALLOW WAIVER OF RIGHT TO COUNSEL ON APPEAL

Alternatively, his
MOTION TO APPOINT (NEW) APPELLATE COUNSEL

[p. 2] **Unabridged History of this Matter**

Fleming initially raised the right to counsel in the context of speaking on his own behalf. (Docket Entry 108. *See also* 170, 189.). There being no waiver, the court appointed counsel for Fleming on the issue of self-representation. (146, 147). Subsequently, the court appointed counsel. (279. *See also* entry of 13 September 2000, letter regarding substitution of counsel.). Because Fleming had exercised self-representation, the beneficiary moved to strike Fleming's pleadings as not submitted by counsel. (296). The court ruled on Fleming's motions. (*See* 233, 293 & 295). Thus, it was clear that prior to the formal appointment of counsel, Fleming exercised his right to represent himself.

Fleming's counsel's next motion (extension of time) is Docket Entry 350, which was granted. (358). Via counsel, Fleming subsequently filed various motions. (*See, e.g.,* 403-409). Fleming then moved that appointed counsel withdraw, (615), and by way of emergency, gave notice of termination of the lawyer-client relationship so as to proceed on his own behalf. (638, 639). At the hearing, the court granted the relief, stating that Fleming freely, knowingly and intelligently waived his right to counsel. (661). The court granted the motion to withdraw. (662). In a separate and specific order, the court indicated this:

> [T]he defendant freely, voluntarily, knowingly and intelligently waived his right to counsel and the Court determines that he is competent to waive his [p. 3] 6th Amendment right to counsel; accordingly, the defendant shall proceed pro se in this matter and his right to counsel in this matter will be forever waived.

(Docket Entry 663). Fleming has filed no financial statement of any type or kind.

Fleming filed several documents later struck from the Record. (714-730 and 780; 810 and 847; 889 and 921; 945 and 949; 1006 and 1008). However, Fleming also filed motions that were ruled on (denied, but ruled on). (856-857 and 867; 898 and 910 (denying a motion to strike); 883, 888, 889 and 922; 920 and 930; 938 and 942; 954-955 and 957; 971 and 972; 978 and 993; 990 and 997; 1002 and 1011; 1004, 1007 and 1008). Representing himself, Fleming eventually entered a plea of guilty with a "plea agreement." (1059, 1060). The court set sentencing for 27 March 2003. (1061).

On 19 March, as sentencing approached, Fleming sought counsel, via emergency. (1164). On 21 March, the court appointed the same counsel as before. (1171, 1180, 1198). Counsel requested a continuance, which was granted. (1172 and 1178). Sentencing was reset for 28 April. The court added the additional condition that Fleming may be required to reimburse this cost. (1180).

Two weeks before sentencing, Fleming came into a new understanding of his entire case. Six days prior, 22 April, Fleming filed his Affidavit, exercising his right of allocution, asserting his defenses, objections and positions never before [p. 4] raised for him or any other defendant. (1218). On the following day, he terminated the lawyer-client relationship, due to the conflict of interest that arose. (1219). Apparently, the Affidavit was filed again. (1220). The trial court made inquiry of the termination notice, but this time, no change in the relationship occurred. (Per sentencing, Docket Entry 1221). The trial court did not consider Fleming's Affidavit. (1221, referring to 1218; 1220 is presumed included). *See also* (2 App. Tab 8 pp. 18-32) and (*id.* at 18, lines 9-16 (plaintiff stipulated to it)).

In *this* court, Fleming's original effort to file his principal brief was rejected. Appointed trial counsel requested withdrawal from this appeal, which was denied. Where *Anders* (state-based, "14th amendment"

genre cases) is the standard, withdrawal *should* be denied. This appeal definitely has merit. *Accord, Ellis v. United States*, 356 U.S. 674, 78 S. Ct. 974, 2 L. Ed. 2d 1060 (1958).

Via Declaration and conditional Motion, construed as a Motion to Revoke In Forma Pauperis Status, and relying upon common law, Fleming sought to confirm or to initiate termination of his in forma pauperis ("IFP") capacity and status. By order of 8 July 2003, the dispaupering relief, and everything else requested, was denied.

Fleming understands the court's order of 8 July. He well receives the court's admonition as to the role of lawyer and client, and he intends no disrespect. [p. 5] It's just that certain things simply *cannot* be raised via counsel. Also, Fleming has no intention of waiving his objection(s) in this area, generally. In sum, the totality of the circumstances compels Fleming to file this directly. While this may be *as* frustrating for the court (and appointed counsel), this cannot possibly be *more* frustrating for anyone than for Fleming, who remains in jail.

Waiver of Right To Counsel on Appeal, and accompanying alternative Motion to Allow Waiver of Right to Counsel on Appeal

IFP status exists to allow access to the court(s) throughout each stage of the entire legal process. IFP depends upon financial conditions, and it consists of two fundamental aspects: *threshold* (filing fees), and *substantive* (representation).

Regarding threshold access, Fleming has already demonstrated his ability to cover the filing fees and costs of court for this appeal.

And, in order to *obtain* substantive, meaningful access, Fleming gives notice of his voluntary, knowing, and intelligent Waiver of Right to Counsel on Appeal, as confirmed by signature here:

/s/ Don Fleming 8-11-03
Don Fleming

While this seems the nature of a notice, if this is properly a motion, then such motion to allow waiver of right to counsel on appeal is asserted. Fleming [p. 6] understands that this court will look to the totality of the circumstances, including conflict of interest, age, experience, education, background, intelligence, and the presence or absence of intimidation, coercion or deception.

In the alternative, Fleming's Motion to Appoint (New) Appellate Counsel

With no intention of waiving his right to speak on his own behalf, and simply to propose a temporary, interim solution for all involved, Fleming notes that this court *could* appoint him different *appellate* counsel.

Fleming respectfully reserves the right to object to such appointment, as he asserts regarding the present appointment, as this case and its uniqueness on appeal may require him so to do. For example, the appointee shall (a) have won at least one IRC § 7201 matter at trial or on appeal; (b) know (1) the difference between "gross income" and "tax imposed," (2) between *business* "gross *income*" and *individual* "*tax* imposed," (3) what "claim of right" means, (4) the substantive difference between Married Filing JOINTLY and Married Filing SEPARATELY, (5)(A) the substantive difference between legal ownership theories and equitable ownership theories, and (B) the competent accounting that goes with each theory; and (6) the unconscionable difference between "joint and several liability" and the recently exposed *multiple and separate liability* offenses committed against at [p. 7] least Fleming and Arnold, which "numerics" quite clearly rise to the level of fraud on the trial court. Such appointee shall (c) be able to recognize an attempted willful misappropriation (theft) case when s/he sees one, so as to analyze correctly the

necessary actus reus and mens rea for such alleged crime; (d) understand the executory nature of "plea agreements;" and (e) understand the Law of Trusts, in particular disclaimer, which permeates this entire case.

To bring this full circle, should there be no authorized representative presently available who can fulfill these basic criteria and competencies, then Fleming *is* the best (*only*) one to present *his* appeal, *this* appeal.

Prologue

The objective here is to get on with the business of presenting *this* appeal in a fashion and manner consistent with notions of justice and fairness. Given that Fleming sits in jail based on *these* "numerics," and that the level of conflict that exists here is substantial, there *must* be a solution, for all involved.

Even unrepresented prisoners blatantly and solely out to screw over the correctional officers get "three strikes." Yet, a serious physical endangerment or injury issue overrules that bar. Here, the real injury is the loss of liberty. Even if Fleming spots two "strikes" to the score, since it's *Fleming's* liberty at issue, there is an increasingly *diminishing* reason not to allow him *his* appeal.

[p. 8] This case started out as a political hot potato. Nothing has changed, and Fleming *still* seeks to have *his* appeal heard. Therefore, he submits his voluntary, knowing, and intelligent Waiver of his Right to Counsel on Appeal. If necessary, as an interim measure of alternative relief for all concerned, for the time Fleming is to be recognized solely through counsel, at least appoint temporary, interim new counsel who can discuss at least these concepts: *business* "gross income" versus *individual* "tax imposed," "claim of right," usury, debtor's prison, trusts and disclaimer, conflict of interest, compelled acceptance of a fiduciary role, and mistake of fact induced by ignorance of law, as each applies in *this* (theft) case.

Discussion

History of IFP. In his book, THE FORGING OF THE FEDERAL INDIGENT CODE, Comer provides insight to the 200-year development of the access to the courts from the dates relevant to the founding of this people of the United States through the mid-1960's. JOHN P. COMER, THE FORGING OF THE FEDERAL INDIGENT CODE (1966). In his disciplined effort to present the information objectively, he actually understates the significance of the legal and social history he records. Access to the courts didn't really exist at first. Many key advances started in the 1870's. Advances in the [p. 9] criminal area took the lead, the earliest representation matters dealing with the most serious of cases, the death penalty cases. Advances in the civil area followed. In short, there's been a *huge* development in this area of access to the courts over several generations, from practically no access to what is now the "three strikes" rule by which frivolous complaints of inmates are tolerated, but which operates as a bar, shy of serious physical abuse complaints. *See* 28 U.S.C. § 1915. Abuse tends, and reasonably so, to change people's minds.

Two fundamental aspects. Two fundamental issues exist for IFP access: (1) *threshold* (filing fees and costs of court), and (2) *substantive* (representation).

Threshold Access. Fleming paid his fees for this appeal. Fleming paid for the transcript of the sentencing hearing. To borrow a practical reality from 28 U.S.C. § 1915, which doesn't apply here, fees must still be paid, whether up front or in installments, regardless of IFP. As for this specific appeal, the access to the courts through filing fees and basic costs of court is simply not the issue. Fleming paid these in advance.

In sum, it matters that threshold access exists. Where the individual finds himself in need of access, it's available, and private organizations of all sizes and interests are also available to contribute resources to those in need of threshold access to the courts. For

purposes of this appeal, and as demonstrated, Fleming is simply not one who has a threshold access issue.

[p. 10] Substantive Access. It may be a unique circumstance for one to seek to dispauper himself. However, when substantive, meaningful access has been effectively denied, it makes sense to find another route.

Rules matter. Procedures matter. Capacity issues matter. Consistency matters. Therefore, we discipline ourselves according to the rules, and let the chips fall where they may.

Fleming and Arnold, each *without* representation, *are* the ones in the best position to discuss *this* case. Each raised issues at the 11th hour not previously raised by any other defendant in the case, and Arnold has recently also filed another Affidavit (Case No. 03-12810-D) exposing the "double dipping" engaged in by the beneficiary. Thus, Fleming isn't focusing solely on appointed counsel. For example, in *United States v. Jannuzzio*, 184 F. Supp. 460, 465 (D. Del. 1960), the beneficiary sought criminal sanctions for non-payment of FICA. It's subtle, but the trial court's analysis *does* point out the deficient character of a case that seeks to reimplement debtor's prison. *Who* raised that issue, which screams out from the Indictment? Fleming and Arnold.

Which "right?" The conceptual basis for the right to *assistance* of counsel is the Sixth Amendment. However, *if* the Sixth Amendment *were* the basis of the idea in practice today, then we'd see the complete bar to, the complete lack of [p. 11] subject matter jurisdiction for judicial activity in which the right to assistance is not respected. The Sixth Amendment, as one of Ten Additional Prohibitions, *limits* the constitutional Government. It *grants* nothing; rather, by weaving the pre-existing right to assistance into the fabric, it operates to *prohibit* Article III judicial authority where this pre-existing right is not respected.

What the "sixth amendment" shifts the focus to is a right to *representation* which competes with the right to

"self-representation," or to "represent oneself," which label, on first pass, appears to be a misnomer. One "represents" someone *else*; one "speaks" for one*self*. However, if we are talking about two completely separate capacities being present at the exact same time, the one "representing" the other, *then* "self-representation," or "representing oneself," tells us something.

Since what exists are competing "rights," which is preferred? Are these viewed differently on appeal? What is the scope of a waiver of either one? By what standard, law or discretion, is either evaluated? A couple of annotations and a statute provide a place to start for these questions. Gary Knapp, Annotation, *Supreme Court's Views as to What Constitutes Valid Waiver of Accused's Federal Constitutional Right to Counsel*, 101 L. Ed. 2d 1017 (1990) ("Knapp, *Waiver*"); John F. Wagner, Jr., Annotation, *Supreme Court's Views as to Accused's Federal Constitutional Right to Counsel on Appeal*, 102 L. Ed. 2d 1049 (1990) ("Wagner, [p. 12] *Appeal*"); 18 U.S.C.S. § 3006A (Law. Co-op. 1993 & Supp. 2003) ("§ 3006A").

While waiver *may not* occur "accidentally," it *may* occur deliberately. Knapp identifies only a couple of specific examples for appeals. Knapp, *Waiver*, at 1042 (§ 15). But, as identified throughout, where there is an affirmative declaration regarding waiver, the waiver is recognized, as the trial court did in this case. What Wagner's study points out, generally, is that there are similar standards for representation on appeal. For example, the accused enjoys the right to effective assistance of counsel on appeal. Wagner, *Appeal*, at 1055-56 (§ 3(b)). As supported in each annotation, the right to representation prevails over the right to self-representation, until such time as the defendant voluntarily, knowingly and intelligently waives the right to counsel. Since the right to counsel applies at every stage of the criminal proceeding, the scope of waiver of the right to counsel is a "per stage" scope. Waiver for one stage or several stages does not necessarily also constitute waiver for the next one, as also shown in the

trial proceedings here. And, the statute provides both legal and discretionary standards for evaluation.

> "Shall be represented" *when*?
> (c) Duration and Substitution of Appointments. - A person for whom counsel is appointed *shall be represented* at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings.

[p. 13] 18 U.S.C.S. § 3006A(c).

For context, there's the classic "shall" and "may" difference incorporated into this statutory plan. From § 3006A(a)(1) ("(a) Choice of Plan. ... (1) *Representation shall be provided* for any financially eligible person who - ..."), there's the "shall" side, and then from (a)(2) the "may" side, which simply expands the list, in the interests of justice ("Whenever the United States magistrate judge or the court determines that the interests of justice so require, *representation may be provided* for any financially eligible person who - ...").

"Shall be provided" *when?* "May be provided" *when?* At all times and stages *prior to* there being entered of Record a voluntary, knowing and intelligent waiver of the right to representation, which waiver operates until there is another stage *and* an affirmative request for representation.

> Unless the person waives representation by counsel, the United States magistrate judge or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him.

Id. at § 3006A(b). Thus, to address "shall be represented" *when*, the question is answered: until there is a voluntary, knowing and intelligent waiver. The trial

court followed and applied meticulously this standard from the outset.

The appeal is a new stage of the proceeding. In this Record, for this stage, for the entirety of the remainder of additional stages on this appeal, and for all [p. 14] subsequent stages for this case, whether additional trial, additional appeal or both, whether mandatory or discretionary, Fleming voluntarily, knowingly and intelligently waives his "federal constitution" "sixth amendment," and § 3006A, right to representation by counsel.

/s/ Don Fleming 8-11-03
Don Fleming

New counsel. As regards the alternative motion, to appoint (new) appellate counsel, Fleming did not write the "tax code." It is not within his control that certain practitioners make entire careers out of a few *sections* of that trust indenture. Thus, it's not his fault that specialization exists among the authorized representatives, much less even within the group of "federal tax" practitioners. In short, if *substantive* access has any reality for a specialized matter, then a defendant is *more than* fully entitled to receive that specialized *substantive* access. How can the public policy of meaningful access be satisfied any other way? It can't. To "do one's best" matters, but that focuses on a right to *representation*, not a right to *assistance*. Does one take a broken toe to an ophthalmologist? Many eye doctors are *perfectly* capable of setting the appendage, but this is *not* the typical procedure, which in no way raises a question to *any* eye doctor's ability in ophthalmology. It's just that whatever emergency (i.e., immediate and short term) [p. 15] care provided is normally followed promptly by examination and long term care by the orthopedic specialist. In general, is something better than nothing? In a lot of cases, it most *definitely* is. Zero question about that. But herein lies the rub; it *is* a case-dependent answer.

Additionally, it may be suitable to consider, at some point, establishing a sua sponte standard that allows for appointment of new counsel upon the existence of Record of a conflict of the nature that justifies inquiry. In other words, there comes a point when the matter, as is the case here, is so clear, and genuine, not at all even remotely asserted for delay, where, in lieu of a waiver, *not* providing relief in the form of new counsel tends to defeat completely the purpose of having the lawyer-client relationship in the first place.

Conclusion

IFP addresses *threshold* (filing fees) and *substantive* (representation) access. Fleming doesn't have the threshold issue, and he voluntarily, knowingly and intelligently waives his right to counsel for this stage and all future stages of this case. If this is a motion, then Fleming so moves, as confirmed by signature.

/s/ Don Fleming 8-11-03
Don Fleming

[p. 16] Alternatively, if there exists a problem with this waiver, then, because Fleming and Arnold intend to "commission" this court to write the bible for § 7201 cases, from indictment to sentencing, by relying upon the justiciable issue doctrine of *Roe v. Wade* should timing deem such necessary, should there be an interim, short term, need for appointment of new counsel for Fleming for this appeal, there are certain aspects of competence that the representative must have. Otherwise, it's impossible to say that Fleming is any less capable of representing himself for *his* appeal than any of the available authorized representatives.

Relief Requested

Fleming announces his Waiver of Right to Counsel on Appeal, expecting that the suitable sua sponte activity

consistent with such declaration will follow. Alternatively, Fleming requests that this court grant his Motion to Allow Waiver of Right to Counsel on Appeal. Alternatively, by way of an interim solution, Fleming requests that this court at least appoint (new) appellate counsel.

Respectfully submitted,

/s/ Don Fleming 8-11-03
Don Fleming
1012 Crestdale Street
Jacksonville
Florida [32211]

[p. 17] **Verification**

In the event I have no access to a notary, I hereby declare (or certify, verify or state), under the penalty of perjury, as may be defined by the law recognized by this forum, that I am competent to make this Verification, that I have personal knowledge of the facts, that they are true and correct, and that the above and foregoing Waiver of Right to Counsel on Appeal, as recognized as arising from the "federal constitution's" "sixth amendment," and from 18 U.S.C. § 3006A, and from any other applicable source, as it applies to this stage and all subsequent stages of this case, is made fully within my discretion, a voluntary exercise with a sound and disposing mind, in full knowledge of my right to representation by counsel at every stage of this proceeding, and with full reflection on and intelligence of the legal consequences and results of this waiver. I have signed three times in this document, plus the document submission signature, plus this Verification, voluntarily, knowingly and intelligently, in order to bring this waiver into effect in the Record of this matter.

Date of signing: 8-11-03 /s/ Don Fleming
Don Fleming
Affiant, Declarant

[p. 18] In the event I do have access to a notary, there's this.

Before me, the undersigned Notary Public, personally appeared Don Fleming, who, upon satisfactory identification shown to me, and upon oath or affirmation administered by me, deposed and stated as follows:

1. I am Don Fleming, a resident of the State of Florida, domiciled in the County of Duval.
2. I am at least 21 years of age. I have personal knowledge of these facts, which facts are true and correct, and I am competent to make this Affidavit.
3. The above and foregoing Waiver of Right to Counsel on Appeal, as stated in the document, confirmed by my signature three times in the document, and again by signing the document's submission signature block, and yet again here, by which I intend to incorporate the Verification paragraph above, I make voluntarily, knowingly and intelligently.

Further, Affiant sayeth not.

Date of signing: 8-11-03 /s/ Don Fleming
Don Fleming
Affiant, Declarant

not available - see page 17
Signature of Notary Public (SEAL)

(Signature block continued)
[p. 19] (Only if not visible in SEAL:)

Printed Name: _____
My Commission Expires: _____

Certificate of Service

By my signature below, I certify that I have served, or caused to be served, either by first class mail (certified, return receipt requested) or hand delivery, a copy of this Notice of Waiver of Right to Counsel on Appeal, and the accompanying alternative Motions, with Verification, on the following:

Susan H. Raab
Tamra Phipps
Assistant United States Attorneys
Appellate Division
300 North Hogan Street, Suite 700
Jacksonville, Florida 32202

James A. Hernandez
Hernandez & Hernandez
1905 Atlantic Boulevard
Jacksonville, Florida 32207

Paul I. Perez, Jr.
United States Attorney
Middle District of Florida
400 North Tampa Street, Suite 3200
Tampa, Florida 33602

Sheryl L. Loesch, Clerk of Court
United States District Court
Middle District of Florida
George C. Young U.S. Courthouse
and Federal Building
80 North Hughey Avenue
Orlando, Florida 32801

/s/ Don Fleming
Don Fleming

25 September 2003 Clerk's action–Returning unfiled Fleming's *Mickens* Affidavit

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

September 25, 2003

Donald C. Fleming (#21483-018)
Jesup FCI
2600 S US HIGHWAY 301
JESUP GA 31599-5676

RE: 03-12283-DD USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

I am returning to you unfiled the pro se papers which you have submitted. Because you are represented by counsel, the rules of this court do not allow us to accept these papers from you. See 11th Cir. R. 25-1 and 11th Cir. R. 28-3. We suggest that you communicate with your attorney concerning issues or arguments which you believe should be presented to the court.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Nicole Jones (404) 335-6173

Encl.

PRO-3 (8-2000)

22 September 2003 — Subject document (enclosure) of immediately preceding Clerk's action

U.S. COURT OF APPEALS
RECEIVED CLERK
SEP 22 2003
ATLANTA, GA.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12283-DD

UNITED STATES OF AMERICA,
Plaintiff–Appellee,
v.
DONALD C. FLEMING,
Defendant–Appellant

On appeal from the trial court, the
UNITED STATES DISTRICT COURT,
for the MIDDLE DISTRICT OF FLORIDA
Transaction No. 3:00-cr-262-J-20HTS

FLEMING'S AFFIDAVIT GIVING NOTICE OF RECORD, PER *MiCKENS*, OF INEFFECTIVE ASSISTANCE OF COUNSEL

The circumstances are unfortunate; alternatives, increasingly limited.

/s/ Don Fleming
Don Fleming, in my FEDERAL CAPACITY as DONALD C. FLEMING

[p. 2] Pursuant to 28 U.S.C. 1746, I, Don Fleming, in "this state," in my FEDERAL CAPACITY as DONALD C.

FLEMING, looking to *Mickens v. Taylor*, 535 U.S. 162 (2002), as that may apply for appellate proceedings, depose and declare (or certify, verify or state), under the penalty of perjury, as that may be defined by the law recognized by this forum, as follows:

1. I am at least 21 and competent to make this Affidavit. I have personal knowledge of the facts, and they are true and correct. The legal opinions are my own, and they are based upon due diligence study of the matters presented.

Facts, Not Self-Representation.

2. I am now aware of *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152 (2000), and in this Affidavit, I'm not asserting a right to self-representation on appeal. I'm simply asserting, in my role as one with personal knowledge of material and developing facts relevant to this matter, those facts relevant to my personal, protected and fundamental right of effective assistance. Thus, rather than making a direct request for relief, I'm simply making the Record for this factual, material issue, timely enough to allow a resolution that allows me (or a substitute representative) time to file a brief for my appeal. [p. 3]

No effective communications.

3. While I've been filing documents in this matter, I've also been waiting for a response from appointed counsel to my correspondence and phone calls. Since sentencing, appointed counsel has not seen fit to communicate, in writing or phone, about anything, in particular his thoughts on the appeal.

4. After I was first incarcerated, while he was counseling other clients, he did at least stop by briefly, just long enough to provide a form that was supposed to allow me to exercise self-representation on appeal. Based upon that filing and information, I submitted a brief on or about 2 June 2003, which is now Exhibit 2 (with Appendices, Exhibits 3, 4 and 5) in the Record in ARNOLD's appeal, Case No. 03-12810-D, which brief was

returned to me, because I was not recognized as one authorized to exercise self-representation on appeal. There was one other very brief visit early in May, but I've heard nothing from him until last week.

5. In the one conversation with him in early May, he indicated that he felt I had nothing to appeal, and that he was going to file a motion to withdraw, which he did file (but apparently didn't copy me on), and which, obviously, was denied.

6. I'm sure I've sent him every document I've filed. Still no word.

7. Recently on 9 September, last week, four and a half months of incarceration later, after numerous attempts to contact him by phone, and by two letters, I placed [p. 4] another pre-paid call to counsel. He actually took the call this time, and we talked briefly. He seemed not to be terribly interested. He told me he was awaiting transcripts of the two hearings he had requested. When I told him I already had the transcript of the sentencing hearing which I had ordered in early May (which transcript is found at Tab 8, *see* ARNOLD's Ex. 5), there was a pregnant pause in the conversation. He then indicated that the plea hearing transcript would be ready within the next 30 days and that I might expect to hear from him again, then.

Conflict, Ineffectiveness and Abandonment.

8. Waiting another 30 days is all well and good, but in that time, I'm fully expecting the following, which perspective only raises conflict to impasse.

A. The present deadline for the Transcript for the trial of ARNOLD and EVANS is 22 September. Should that turn out to be the filing date, the time for the briefs is likely officially to begin. Since the transcript of the plea hearing has been available for order since 20 December 2002 (Docket Entries 1059 and 1060) (9 months), and since the Notice of Appeal was filed on 30 April 2003 (four and half months), and since the motion to withdraw was denied several months ago, my

expectation is low that any additional time will be permitted for submitting the brief as based upon any additional transcript request at this time.

B. That being the case, 30 days from "now" is about three weeks into the [p. 5] six-week time period for the principal briefs. The court may or may not allow additional time, and since my brief was submitted three and a half months ago, again, I'm not counting on a lot of leeway.

C. Additionally, over the past four and a half months, where I've been unable to submit the brief, or anything else, which brief, on its face, also requests Release Pending Appeal, I've been in jail instead of released pending appeal, without even the authority to request Release Pending Appeal, because I've been denied self-representation. Thus, to wait for yet another 30 days just for a maybe to hear back on transcripts, during which time a Motion for Release Pending Appeal, which should have been filed at least in June when my efforts toward that end were rejected, could be filed and results obtained, is unthinkable and unbearable. I shouldn't have to beg for zealous representation. It's supposed to be part of the normal course.

D. Appointed counsel is a very decent person, and for the most part, a caring representative for his clients. As a person, I like him, and I'm comfortable that most feel the same way. But, it's not his butt that's in jail, and the conflict in perspective that he and I have has simply reached an impasse.

9. Since I am the one asserting my defenses, objections and positions, starting at the 11th hour in the trial court and continuing on appeal, rather than appointed [p. 6] counsel, and since I'm "on hold" for yet another 30 days, awaiting transcripts that could (should?) have been requested months ago, as I learned in the first pre-paid call to him that he's accepted, which was last week, 9 September 2003, and since he's filed nothing for me on appeal, despite the fact this court has disallowed his motion to withdraw, which is yet another indication that

there's got to be *something* worth raising on appeal, and since the expected briefing period is within 10 days of starting, the sole conclusion I have is one of ineffective assistance and effective abandonment.

10. Nothing in the recent conversation indicated any change in his perspective first communicated in April, and again in May, that he considers executory "Plea Agreements" as binding once made and simply not alterable or appealable under any circumstances. Illustrative of the conflict of interest already of Record, and exacerbated by this recent conversation, I see *nothing* about the plea hearing that alters the factual insufficiency of the Indictment, the plea, the "agreement," or the Judgment. Thus, I see this matter *very* differently and *very* appealable.

No Basis for Plea or Judgment.

11. For at least the reasons presented in this Affidavit, I challenge the validity of the Indictment, the plea, the enforceability of the "Plea Agreement" and the basis for and substance of the Judgment. Count One alleges no facts in support of [p. 7] the crime it defines. Similarly, the guilty plea has no factual basis (and was not knowing and intelligent). *Bousley v. United States*, 523 U.S. 614 (1998); FED. R. CRIM. P. 11(f)). Consequently, the "Plea Agreement" is unenforceable, and the Judgment is void and properly vacated. Further, because these defenses, objections and positions were not asserted on my behalf during pretrial, allocution or "sentencing" phases, I also include them as basis for ineffective assistance.

Embezzlement (§ 7201) versus Larceny (§ 371 (defrauding)).

12. Even KLEIN didn't commit a Klein conspiracy! *See* ARNOLD's (Fourth) Motion for Release Pending Appeal, Case No. 03-12810-D. The Klein conspiracy (§ 371 (defrauding)) defines larceny by trick. But, there's not one fact asserted in the Indictment or in the "Plea Agreement" that even remotely establishes my, or anyone else's, *acquisition of possession* of anything from either

the Department or the IRS, at any time, by any means, much less by trick or other dishonest means. I've defrauded no one. There's no larceny here. (No embezzlement, either.) Thus, there's simply no factual basis supporting any of Count One, the guilty plea, the "Plea Agreement" or the Judgment.

The Instantaneous Breach of the "Plea Agreement," "Employment" "Taxes" and Debtor's Prison.

13. In addition to the debtor's prison problem, which arises from the criminal [p. 8] charges on "employment" "taxes," *see* ARNOLD's Ex. 2 (pp. 15-18), there's also the very overt fact that the "Plea Agreement" was *supposed* to be based upon Count One *only*. There's not one red cent of "employment" "taxes" anywhere identified in Count One. The *only* counts that mention such figures are Counts Six and Seven. *Cf.* ARNOLD's Ex. 4 (2 App.) Indictment 1-16 (Count One), *with* Ex. 4 (2 App.) Indictment 22-24 (Counts Six and Seven). Thus, even if "employment" "taxes" were subject to criminal enforcement, this "Plea Agreement" breaches itself instantly, by purporting to dismiss everything but Count One, and then by turning right around and including Counts Six and Seven.

14. The "agreement," then, as construed against the party who drafted it, is self-contradicting. It's breached instantly upon signing. Both the "agreement" and the Judgment state that all counts except Count One were dismissed, yet Counts Six and Seven are incorporated into the "agreement."

Wrong Party–Not My "gross business income."

15. While pleading multiple counts and alternative theories may be permissible, pleading "alternative facts" is not. Count One's "facts in the alternative" regarding the "gross *business* income" actually confesses that the "gross income" attributed to me is most definitely *not* mine.

16. The problem is illustrated and encapsulated in five

paragraphs: ¶¶ B.1, [p. 9] B.11, B.15, C.5 and C.14. "FLEMING ... controlled, operated and owned a radio broadcast business ... [which] earned gross business income." ¶ B.1 (p. 2). This business (singular) is alleged to operate under different names, among them AAA Enterprises and Info Distribution. B.11 (p. 5). But, AAA Enterprise is a business trust, EIN 52-6617874, and Info Distribution is a business trust, EIN 52-6617872. In general, the mere existence of an EIN puts the beneficiary on notice that it's a separate fiduciary, with its own "claim of right" to its own "gross income." Further, for there to be at least *two* of such separate entities labeled as *one* "business," the beneficiary's confession of commingling rings from the page. *See also* ¶ B.15 ("The primary purpose of Global was to buy Info Distribution and AAA Enterprises from Jimal.").

17. The lulu, lullapaluzer, whopper of an inconsistency ("facts in the alternative") is this:

> Fleming controlled, owned and operated a ... ***business*** ... under various names ..., which was virtually the exclusive source for broadcast traffic reports to radio and television stations in the metropolitan area and from which ***he*** earned millions of dollars in gross ***business*** income ... from at least 1986 through 1998.

¶ C.5 (p. 9) (emphasis added). ***Whose*** "gross income?"

18. That's the overview. Additional details are these. Count One confesses and recognizes the separate business entities. ¶ B.11, p. 5 ("Entities"). Count One [p. 10] alleges that I control a/the separate entity(ies):

¶¶ B.1 (p. 2) (the *TraffiCenter* earned "gross business income");

B.3 (p. 3) (ARNOLD served as trustee of "FLEMING's" businesses);

B.4 (p. 3) (BLOOMQUIST served as trustee);

B.5 (p. 3) (BOSWORTH was employed by a business

entity controlled and operated by FLEMING; MIG bought the business known as TraffiCenter; MIG employed FLEMING in the operation of this business);

B.6 (p. 4) (trust entities);

B.7 (p. 4) (business entities);

B.8 (p. 4) (KAMISH was employed by one or more business entities controlled and operated by FLEMING, including the TraffiCenter; various employment positions and business entities);

B.11 (p. 5) (TraffiCenter is an "entity" controlled, operated and owned by FLEMING; "TraffiCenter earned gross business income;" the one business operated under different names, which, as identified above, were *not* different names, but different, separate, independent business entities altogether, as confessed three *and* four paragraphs later; hence the beneficiary's confession of commingling);

B.13 (p. 5) (Avalon is a separate entity); [p. 11]

B.14 (p. 5) (Jimal is a separate entity; NOTE: Only three paragraphs previous, AAA Enterprises and Info Distribution were merely separate names for one business, namely TraffiCenter; here each is identified and recognized as a separate business entity);

B.15 (p. 6) (Global is a separate business entity; NOTE: Four paragraphs previous, AAA Enterprises and Info Distribution were merely separate names);

B.16 (p. 6) (Sharuco is a separate business entity);

B.17 (p. 6) (MIG is a separate business entity, one purpose of which was to purchase the business entity known as TraffiCenter);

B.19 (p. 7) (The confessed intent to annihilate the business entities that are trusts; the confession that the *sole* basis for such annihilation *is* the non-recognition, non-respect, of the business entity's fiduciary obligation); and

B.22 (p. 7) ("Employment taxes," thus reinstigation of debtor's prison, but, conveniently, the employer, TraffiCenter, is not identified).

19. But, all of a sudden, these separate entities aren't

really separate entities, after all, by simply recharacterizing them as "sole proprietorships" or nominee entities. ¶¶ C.1 (p. 8); C.2 (p. 8); C.4 (p. 9); C.5 (p. 9); C.6 (p. 9); and C.7 (p. 10).

20. But, even mid-thought, the dream fades back to reality. ¶¶ C.8 (p. 10) (back to the separate existence of the entities, as such, so that they may be sold); C.9 (p. [p. 12] 10) (UBO's identified as non-income producing, and separate and distinct entities from the business activities identified); C.10 (p. 10) (a new separate entity, Consolidated); C.11 (p. 11) (Jimal and TraffiCenter are separate entities, again, and Fleming controls and owns TraffiCenter); C.12 (p. 11) (TraffiCenter, controlled and owned by Fleming, is a separate entity, again, as is Global); C.13 (p. 11) (MIG is a separate entity, as is TraffiCenter, still owned and controlled by Fleming, of course); **C.14 (p. 11) (Why in the world are separate fiduciary reports even *expected* for corporate, trust or partnership income, *if* all the entities are shams, nominees or sole proprietorships? And, since the beneficiary expects that such forms *be* submitted, the beneficiary attributes "gross income" to *each* entity, thus *confessing* its *recognition* of these entities as *separate* fiduciaries. Yet, all "gross income" is simultaneously *mine?*)**; D.4 (p. 12) (separate entities, in particular AAA Enterprises and Info Distribution).

21. In sum, the pleadings, themselves, confess the blatant "claim of right" problem, here, in that they allege throughout that the "gross *business* income" is the entity's (entities). The "facts in the alternative" confess confusion; they do not alter the separate existence of the business entities.

22. Bottom line: none of that "gross *business* income" was or is mine. [p. 13]

The Applicable Rules and Some Supreme Court Opinions.

23. Independent from any substantive defense, objection

or position I have, I'm satisfied that appointed counsel's foundational (definitely well-meaning, but errant) perspective, that "Plea Agreements" are simply not appealable, period, contributed greatly to his failure to assert my 11th hour substantive defenses, objections and positions for and at allocution and sentencing. In addition to FED. R. CRIM. P. 11(f) and 32(e), here are some opinions, available at the time of sentencing, whether published or otherwise electronically available, in which the guilty plea- or "Plea Agreement"-based Judgment was reversed or vacated:

> *Kyllo v. United States*, 533 U.S. 27 (2001) (9th Cir. affirmed; S. Ct. reversed and remanded).
>
> *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (NJ affirmed; S. Ct. reversed).
>
> United States v. Corson (Docket No. 98-2282) (1st Cir.) (not to be cited as authority) <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/1st/982282.html>.
>
> *United States v. Hubbell*, 530 U.S. 27 (2000) (S. Ct. dismissed indictment).
>
> *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (plea agreement; appeal not timely filed; federal habeas relief denied by trial court; 9th Cir. reversed; S. Ct. vacated and remanded, providing the standard to apply).
>
> *Mitchell v. United States*, 526 U.S. 314 (1999) (3d Cir. affirmed, S. Ct. reversed and remanded).
>
> [*United States v. Hyde*, 520 U.S. 670 (1997) (analyzing FED. R. CRIM. P. 32(e) allowing a defendant to withdraw his guilty plea for any fair and

just [p. 14] reason) ("We hold that in such circumstances a defendant may not withdraw his plea unless he shows a 'fair and just reason' under Rule 32(e).").]

Stinson v. United States, 508 U.S. 36 (1993) (11th Cir. affirmed; S. Ct. vacated and remanded).

Doggett v. United States, 505 U.S. 647 (1992) (11th Cir. affirmed; S. Ct. reversed and remanded).

Burns v. United States, 501 U.S. 129 (1991) (DC Cir. affirmed; S. Ct. reversed and remanded).

Braxton v. United States, 500 U.S. 344 (1991) (4th Cir. affirmed; S. Ct. reversed and remanded).

Hughey v. United States, 495 U.S. 411 (1990) (5th Cir. affirmed; S. Ct. reversed and remanded).

Ricketts v. Adamson, 483 U.S. 1 (1987) (state court plea agreement; federal habeas; 9th Cir. reversed; S. Ct. reversed).

Mabry v. Johnson, 467 U.S. 504 (1984) ("A plea bargain standing alone is without constitutional significance; *in itself it is a mere executory agreement* which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest.") (emphasis added) (state court conviction set aside; plea agreement; exhaustion of state remedies; federal habeas; 8th Cir. reversed; S. Ct. reversed).

United States v. Morrison, 449 U.S. 361 (1981) (3d Cir. reversed; S. Ct. reversed and remanded).

Blackledge v. Allison, 431 U.S. 63 (1977) (state court plea agreement; federal habeas; trial court dismissed

habeas; 4th Cir. reversed; S. Ct. affirmed).

Santobello v. New York, 404 U.S. 257 (1971) ("This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of [p. 15] guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.") (state court plea agreement; appellate court affirmed; S. Ct. vacated and remanded).

The Agreement and the Trial Court's Instructions.

24. In addition to the preceding item, the "agreement" specifically states the reality that it's not binding on the court, Ex. 3 (2 App.) "Plea Agmnt" 3 (rendering it "executory," nothing but a "joint offer" by the parties, until accepted by the court), and the trial court *specifically stated* that an appeal exists where there is an error of law. Ex. 5 (2 App. Tab 8) (starting 5th page from the last) (16:08-16:09).

Wrong Entity–The "Third Res" is Not My Obligation.

25. I never signed the "Returns" prepared for me by the IRS. *See* Ex. 4 (2 App.) "Returns." They are simply not true or correct, and for me to sign them would be for me to commit perjury.

26. What those "Returns" do is commingle the various separate business entity activity into a wholly separate thing, a thing I call the "third *res*." That "third *res*" didn't exist prior to this litigation. If it still exists, it will cease to exist upon the completion of the final orders from this litigation. It's solely a by-product of this [p. 16] litigation, and it's an entity over which I've *never* agreed to be a fiduciary.

The Beneficiary's Disclaimer.

27. For a business entity to obtain an EIN is for the entity to put the beneficiary on notice of the fiduciary-beneficiary obligation. Acceptance of that relationship and its benefits by the beneficiary is presumed. For the beneficiary to assert criminal charges is to assert recognition of the relationship, but to turn right around and annihilate the very entity(ies) allegedly having a fiduciary obligation is to disclaim all interests arising from that(those) obligation(s). *See* ARNOLD's Ex. 2 (pp. 19-29).

Usury.

28. The "gross *business* income" referred to throughout is not mine. But, if it were, and given that the beneficiary went to so much trouble to include JOYCE FLEMING, my wife, an innocent spouse, *see* IRC § 6015, in this matter, it follows that the proper "tax rate" at which to determine *any* initial distribution amount would be the Married Filing JOINTLY rate. The "returns," *see* ARNOLD's Ex. 4 (2 App.) "Returns," however, charge "tax" at the Married Filing SEPARATELY rate. This hidden interest charge greatly exceeds the lawful interest rates. *See* ARNOLD's Ex. 2 (pp. 3-14). [p. 17]

Valuation versus Payment, and the Payment Mandamus.

Line Item cases versus Bottom Line cases.

29. *Spies v. United States*, 317 U.S. 492 (1943) (a *no return* case) discusses the sanctions gradation in the Code. The gradation distinguishes *line item* cases from *bottom line* cases. A § 7203 case focuses on the "gross income" (or AGI) line item(s). A § 7206 case focuses on the voracity of the line item(s). But, a § 7201 case focuses on the *bottom line*, which is the gravamen "value" at risk of loss element for this form of embezzlement case.

(Underpaid) "(Net) Tax Imposed."

30. What is the bottom line? It's not the "gross income," the "adjusted gross income," or the "taxable income." It's

not even the "(gross) tax imposed," which comes from the initial conversion of "taxable income" into "tax." The *bottom line* is the "(net) tax imposed," which starts with the "(gross) tax imposed" and then considers all applicable credits, payments in particular.

31. The more common term in the opinions is *tax deficiency*. To understand this to be the (underpaid) "(net) tax imposed" is to understand that no § 7201 matter exists without some "value" at risk, which is the underpaid amount, given the proper "(net) tax imposed," which clearly and necessarily includes consideration of all applicable credits, payments in particular. Keeping the term [p. 18] "tax imposed" also preserves the intentional cross references to those provisions throughout the Code that define another "tax imposed."

Valuation and Payment are vastly different cases.

32. Section 7201 contains its own internal gradation. Since all "evading or defeating" cases sound in embezzlement, the question is this: how much certainty in the bottom line is necessary? If *payment* were the sole standard, then the certainty would have to be high, for a *payment* case necessarily involves a sum certain, as should speak for itself. "You owe money." "How much?" "We'll tell you when to stop paying, and if you stop before then, you'll go to jail." Because § 7201 specifically distinguishes *valuation* from *payment*, a *lesser* amount of certainty is tolerated. *That's* the *valuation* case.

33. Even with a relatively uncertain bottom line amount, there must exist a bottom line amount. It must be pled, and it must be proved. Otherwise, the gravamen "value" at risk of loss element for such theft charge doesn't exist. Further, for there to be a *payment* case, that "value" at risk of loss must be a sum certain, which sum certain must be pled and must be proved.

Payment Mandamus.

34. There is no sum certain in this case. There is not even a fiduciary obligation. First, there is no (known)

beneficiary. With an unknown beneficiary, [p. 19] the fiduciary may hold onto any distribution indefinitely. *See* ARNOLD's Ex. 2 (pp. 35-36). To punish someone for what is lawful to do is a flagrant due process violation. *North Carolina v. Pearce*, 395 U.S. 711, 738 (1969). Secondly, since all fiduciaries have been annihilated, all claims are disclaimed as a result. Thirdly, the *sole* amounts identified for sentencing are of the "third *res*," which has no fiduciary. Additionally, even if there were such an obligation, there is not one (underpaid) "(net) tax imposed" for any entity or any individual involved in this matter, much less a sum certain of such "value."

35. In short, this is not a *payment* case, meaning that there is no basis for any mandamus regarding any *payment*. *See* ARNOLD's Ex. 4 (2 App.) Judgment 4.

Ignorance of Law and Mistake of Fact.

36. Whether by larceny or embezzlement, it's impossible to take wrongfully that which one *knows* is his. Because I did not know, until the 11th hour in the original transaction, that any of this had anything to do with a fiduciary obligation, I had zero idea of any other ownership interest or any distribution amount, whether by or to a known or an unknown beneficiary; hence, my allocuted statements to that effect. Thus, even if larceny were a suitable charge, there's no mens rea. *See* ARNOLD's Ex. 2 (pp. 53-57). *See also Morrissette v. United States*, 342 U.S. 246 (1952) (cited in *Cheek v. United States*, 498 U.S. 192, 203 (1991)). [p. 20]

37. Given my ignorance of the law, and the mistake of fact that it produced at the time of my signing the purely executory "agreement," it follows that the "agreement," for the exact same reasons, mistake of fact, is unenforceable.

The "Double Taxation" Scam and Simultaneous Double Jeopardy.

38. Because there is no enforceable plea or "Plea Agreement," double jeopardy protection applies to me.

39. This matter came to light about two months *after* my sentencing, but it's still a matter of ineffective assistance, because it's one more item to be argued on appeal on my behalf, all the more so because it *was* hidden from normal view.

40. For 1996, the beneficiary "taxed" me on 100% of the "gross *business* income," and also "taxed" ARNOLD on another 75% of that exact same "gross *business* income." That's the fraud on the court that is the "double taxation" scam. *See* ARNOLD's First Affidavit, Ex. 7 (ARNOLD's "numerics") and Ex. 4 (2 App.) "Returns" 1 (my "numerics").

41. That "double taxation" becomes simultaneous double jeopardy in this way. The real fiduciaries in interest are the real business entities. For purposes of double jeopardy, those entities are agents for the true owners. Whether or not either one of us *is* an agent for one or more of those entities, we've been charged as such. Thus, as alleged agents for the entities, we, too, become agents for the [p. 21] true owners. By taxing ARNOLD and me, the beneficiary has twice and simultaneously "taxed" the true owners. Since these judgments, each with the payment mandamus, arise from the same case, the same count and the same "gross *business* income," which is neither ARNOLD's nor mine, the true owners are twice subject to loss of property, once through me, and then again through ARNOLD, for the very same offense. And, since these judgments, each with the payment mandamus, occurred "simultaneously," it's impossible to know which of the two "double taxations" occurred first. Thus, double jeopardy protection here necessitates setting aside both Judgments.

Conclusion.

42. In sum, it's impossible to review this information, even in this overview format, and conclude that there is *nothing* meritorious to argue on appeal. I am flabbergasted, *completely* at a loss, as to what the plea hearing transcript has to offer, here, thus, why I need to

wait another 30 days for anything.
43. This Affidavit describes continuing conflict of interest between appointed counsel and myself, which conflict has now reached an impasse, has established abandonment and has confirmed ineffective assistance.
44. Per *Mickens*, this matter is now formally made part of the Record on appeal. [p. 22]

Certificate of Interested Persons.
45. As a housekeeping matter, I adopt and incorporate the Certificate of Interested Persons in ARNOLD's Ex. 2.

Certificate of Service.
46. By my signature below, I certify that I have served, or caused to be served, either by first class mail (certified, return receipt requested) or hand delivery, a copy of this Affidavit on the following:

James A. Hernandez
Hernandez & Hernandez
1905 Atlantic Boulevard
Jacksonville, FL 32207

Susan H. Raab
Assistant United States
Attorneys
Appellate Division
300 North Hogan Street
Suite 700
Jacksonville, FL 32202

Copies also served by regular mail upon the following:

Paul I. Perez, Jr.
United States Attorney
Middle District of Florida
400 North Tampa Street
Suite 3200
Tampa, FL 33602

Sheryl L. Loesch
Clerk of Court
United States District Court
Middle District of Florida
300 North Hogan, Suite 9-150
Jacksonville, FL 32202

Date of Signing: 9-15-2003 /s/ Don Fleming
Don Fleming, in my
FEDERAL CAPACITY as
DONALD C. FLEMING

26 February 2004 Clerk's action–Returning unfiled Fleming's Motion to Redesignate

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

February 26, 2004

Donald C. Fleming (#21483-018)
Jesup FCI
2600 S US HIGHWAY 301
JESUP GA 31599-5676

RE: 03-12283-DD USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

The following action has been taken in the referenced case:

APPELLANT'S PRO SE MOTION TO REDESIGNATE IS RETURNED UNFILED SINCE APPELLANT HAS COUNSEL. A REPRESENTED PARTY CANNOT FILE ANY MOTIONS PRO SE.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Nicole Jones (404) 335-6173

MOT-2 (11-2003)

24 February 2004 (Approximate Date) Subject document of immediately preceding Clerk's action (Filestamped document not returned) (*See* First Amended Notice of Appeal–11 Feb 2004)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12283-DD

UNITED STATES OF AMERICA,
Plaintiff–Appellee,
v.
DONALD C. FLEMING,
Defendant–Appellant

On appeal from the trial court, the
UNITED STATES DISTRICT COURT,
for the MIDDLE DISTRICT OF FLORIDA
Transaction No. 3:00-cr-262-J-20HTS

FLEMING'S MOTION TO REDESIGNATE

Fleming moves that his "Response to Counsel's Second Motion to Withdraw" formally be redesignated as "Appellant's Brief," and that the brief submitted with the Second Motion to Withdraw be redesignated as "counsel's brief in support of second motion to withraw," by whatever capitalization or style is proper in the normal course.

[p. 2] Respectfully submitted,

Donald C. Fleming
Jessup FPC
2600 U.S. Highway 301 South
Jessup, Georgia 31599

CERTIFICATE OF SERVICE

By my signature below, I certify that on this the ___ day of February, 2004, I caused to be served a true and correct copy of this motion by certified mail on the following:

Susan H. Raab
Assistant United States Attorneys
Appellate Division
300 North Hogan Street, Suite 700
Jacksonville, FL 32202

Copies also served by regular mail upon the following:

Paul I. Perez, Jr.
United States Attorney
Middle District of Florida
400 North Tampa Street
Suite 3200
Tampa, FL 33602

Sheryl L. Loesch
Clerk of Court
United States District Court
Middle District of Florida
300 North Hogan, Suite 9-150
Jacksonville, FL 32202

_____
Donald C. Fleming

Rule 14(i)(vi)

Additional Essential Information

30 April 2003 Fleming's Notice of Appeal

FILED 2003 APR 30 A 9:10
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
v.	§	Case No. 3:00-cr-262-J-20HTS
	§	
DONALD C. FLEMING	§	

NOTICE OF APPEAL

Notice is hereby given that Don Fleming, a defendant in the above-captioned case, hereby appeals to the United States Court of Appeals for the 11th Circuit from the final order of this Court with respect to him which order "sentences" DONALD C. FLEMING. This final order with respect to him was entered on or not long after 28 April 2003.

/s/ Don Fleming
Don Fleming
c/o 1012 Crestdale Street
Jacksonville [32211]
Florida

1225

1 May 2003 Clerk's transmittal document for Notice of Appeal

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Office of the Clerk
300 North Hogan Street
Suite 9150
Jacksonville, Florida 32202
(904)549-1900
www.flmd.uscourts.gov

Sheryl L. Loesch
Clerk

Eric A. Hogue
Jacksonville Division Manager

DATE: May 1, 2003
TO: Clerk, U.S. Court of Appeals for the Eleventh Circuit
U.S.D.C. Case No.: 3:00-cr-262-J-20A
Style of Case: UNITED STATES OF AMERICA -vs- DONALD C. FLEMING
U.S.C.A. Case No.:

Enclosed are documents and information relating to an appeal in the above-referenced action. Please acknowledge receipt on the enclosed copy of this letter.

- Honorable Harvey E. Schlesinger, United States District Judge appealed from.

- Appeal filing fee was paid.

- Copy of Notice of Appeal (doc. #1225), certified copy of docket entries, judgment and/or Order appealed from. Opinion was not entered orally.

- Court Reporter: Evelyn Alderman, Marie Splane and Deanne Ferreira-Kozar, Official Court Reporters and Accurate Reporters.

SHERYL L. LOESCH, CLERK
By: Sandra Gatz, Deputy Clerk

Enclosure(s)

7 October 2003 Notice to Fleming of counsel's second motion to withdraw

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

October 07, 2003

Donald C. Fleming (#21483-018)
Jesup FCI
2600 S US HIGHWAY 301
JESUP GA 31599-5676

RE: 03-12283-DD USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

Your court-appointed attorney in this direct criminal appeal has filed with this court and served on you a motion to withdraw as counsel, together with a brief in support thereof. For your convenience, another copy of your court-appointed attorney's motion and brief are enclosed.

Within thirty (30) days from the date of this letter, you have the right to respond to the motion pursuant to Anders v. California, 386 U.S. 738 (1967). You may present any contentions (arguments) you choose which you believe show that your appeal has merit and that this court should hear your case. Your response may be either

handwritten or typed. You should specify all factual and legal bases (grounds) for reversal of your conviction or sentence, including any legal authorities and citations in support thereof which are available to you. Four (4) copies of your response should be filed with this court, one copy should be served on your court appointed attorney, and one copy should be served on the United States Attorney.

Upon receipt of your response (or after 30 days if you do not respond) your attorney's motion and brief and any response received from you will be submitted to the court. After consideration of these filings and review of the record of proceedings in the district court, this court may grant withdrawal of counsel and dismiss the appeal as frivolous, or if it finds any legal points of arguable merit, either deny counsel leave to withdraw or appoint counsel of the court's choice to further brief the appeal.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Elora Jackson (404) 335-6176

Enclosures

APPT-3 (12-2002)

7 October 2003 Counsel's motion and *Anders* brief

FILED
U.S. COURT OF APPEALS ELEVENTH CIRCUIT
OCT 03 2003
THOMAS K. KAHN, CLERK

U.S. COURT OF APPEALS
RECEIVED CLERK
OCT 06 2003
ATLANTA, GA.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
ATLANTA, GEORGIA

UNITED STATES OF AMERICA

CASE NO.:03-12283-DD

vs.

DONALD C. FLEMING

SECOND MOTION TO WITHDRAW

The undersigned attorney in this case moves this Honorable Court to allow the undersigned attorney to withdraw from this case. The reason for this request is as follows:

1. A brief has been submitted pursuant to Anders v. State, 386 U.S. 738 (1967).

For the above stated reason the undersigned attorney it is requested that the undersigned counsel be allowed to withdraw.

I HEREBY CERTIFY that a copy of the foregoing pleading has been served upon ***AUSA A. William Mackie, and to Donald C. Fleming, #21483-018, c/o Federal Prison Camp, Jesup, Georgia 31599***, by U.S. Mail this 3rd day of October, 2003.

Very Respectfully Submitted,

/s/ James A. Hernandez
James A. Hernandez, Esquire
Florida Bar No.: 0871303
1905 Atlantic Boulevard
Jacksonville, Florida 32207
(904) 396-7466
(904 396-9733 (facsimile)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12283-D

UNITED STATES,
Plaintiff–Appellee,
v.
DONALD C. FLEMING,
Defendant–Appellant.

Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF APPELLANT

James A. Hernandez
Bar No. 0871303
Counsel for Defendant-Appellant
1905 Atlantic Blvd.
Jacksonville, Florida 32207
Telephone: 904-396-7466
Fax: 904-396-9733

[p. i]

No. 03-12283-D
U.S. v. Donald C. Fleming

CERTIFICATE OF INTERESTED PERSONS

The following is a list of those who have an interest in the outcome of this case:

1. James A. Hernandez, Counsel for Appelant
2. Will Mackie, Assistant United States Attorney
3. Donald C. Fleming, Defendant-Appellant
4. Honorable Harvey Schlesinger, United States District Judge
5. Susan H. Raab, Assistant United States Attorney, Appellate Counsel for the United States.
6. Paul Perez, United States Attorney
7. Honorable Howard T. Synder, United States

Magistrate Judge

There is no identifiable victim in this case.
C-1 of 1

[p. ii]

STATEMENT REGARDING ORAL ARGUMENT

The facts and legal argument are adequately set forth in the appellant's brief and therefore oral argument is not requested.

[p. iii]

PRELIMINARY STATEMENT

The undersigned counsel has thoroughly reviewed record on appeal, including the plea and sentence transcripts. Based on this diligent review, counsel is unable to argue that the district court committed reversible error and that there exists meritorious grounds for an appeal. Pursuant to counsel's obligations under *Anders v. California*, 386 U.S. 738 (1967), counsel suggests that the issues presented arguable, however, for the reasons cited are without merit.

[p. 4]

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STATEMENT OF JURISDICTION

Title 28 U.S.C. § 1291 provides that the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States except where a direct review may be had in the Supreme Court.

The United States District Court, Middle District of

Florida, Jacksonville Division, had jurisdiction pursuant to Title 18 U.S.C. § 3231.

[p. 6]

This appeal was timely filed within ten days of the entry of judgment rendered in this cause.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Fleming certifies that the size and style of type in this brief is 12 point Courier.

[p. 7]

STATEMENT OF THE ISSUES

I.

WHETHER DEFENDANT'S PLEA OF GUILTY TO COUNT ONE OF THE INDICTMENT WAS KNOWINGLY AND VOLUNTARILY MADE.

II.

WHETHER FEDERAL RULE OF CRIMINAL PROCEDURE 11 WAS SUBSTANTIALLY FOLLOWED DURING THE PLEA COLLOQUY.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

The Defendant was named in a nineteen-count indictment returned by a federal grand jury in the Middle District of Florida, on June 27, 2000. [R2 1-16]. The defendant was charged in counts 1,2,3,4,5,6,7,8,9,10 and 15. The offenses were conspiracy to Defraud the IRS, Income Tax Evasion, Failure to file Income Tax Return and Obstruction of Justice. [R2 1-16]. The defendant pled guilty pursuant to a written plea agreement to count one the conspiracy to defraud the IRS which stipulates that the Government will move to dismiss counts 2 to 10 and 15 of the indictment [R 1060 1-16]. The defendant entered a plea on December 20, 2002 while representing himself pro se before the district court. [R 1060 1-16]

[p. 8]

Defendant filed a timely notice of appeal on April 2003. [R1225-1]. Defendant is currently serving his sentence at FCI, Jesup, Georgia.

(ii) Statement of the Facts

On September 26, 2000, Defendant entered a plea of guilty before the Honorable Thomas B. McCoun III, United States Magistrate Judge, to count one of the indictment, charging him with knowingly and intentionally possessing with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of Title 21, United States

(iii) Standard of Review

The Court of Appeals conducts a two-question "harmless error" analysis when a Defendant alleges that a district court has failed to comply with Rule 11 of the Federal Rules of Criminal Procedure:

(1) Did the district court in fact vary from procedures required by Rule 11, and

(2) if so, did such variance affect substantial rights of the appellant?

U. S. v. Bejarano, 2001 WL 467938, (11th Cir. (Fla.) 2001) citing *United States v. Johnson*, 1 F.3d 296, 297 (5th Cir. 1993).

SUMMARY OF THE ARGUMENT

Counsel suggests that the two issues raised are arguable, however, for the reasons cited, are without merit.

[p. 9]

ARGUMENTS

I.

WHETHER DEFENDANT'S PLEA OF GUILTY

TO COUNT ONE OF THE SUPERSEDING INDICTMENT WAS KNOWINGLY AND VOLUNTARILY MADE.

In *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), the United States Supreme Court held that it was plain error for an Alabama trial judge to accept a plea of guilty, without an affirmative showing on the record that Mr. Boykin's plea to five counts of robbery was intelligent and voluntarily made.

Federal constitutional rights are involved when a defendant enters a plea of guilty in a state criminal proceeding. These rights include the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront and cross-examine one's accusers. The Court cannot presume a waiver of these important constitutional rights from a silent record.

Rule 11 of the Federal Rules of Criminal Procedure is designed to assist the district judge in determining whether the defendant's plea of guilty is voluntary. The rule is intended to produce a record, at the time the plea is entered, of the factors relevant to determining whether the plea is voluntary. In entering a plea of guilty, a defendant waives important constitutional rights, including the privilege [p. 10] against self-incrimination, right to trial by jury and right to confront and cross-examine his accusers. If a defendant's plea of guilty is not knowing and voluntary, it has been obtained in violation of due process and is void. A defendant's plea cannot be truly voluntary unless the defendant understands the law in relation to the facts. *McCarthy v. United States*, 394 U.S. 459, 465 (1969).

In addition to directing the district judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 directs the judge to satisfy herself that there is a factual basis for defendant's plea.

Defendant was advised by the court of important constitutional rights that he would waive if he entered a

plea of guilty [R 304-23, 29-49]. These rights included the right to have an attorney and the assistance of counsel at every stage of the proceeding, the right to trial by jury, the right to confront and cross-examine his accusers, the right to compulsory process or subpoenas to obtain witnesses evidence to present at trial and the privilege against self-incrimination. [R1304-29-49]. Defendant acknowledged that he understood the constitutional rights he would waive by pleading guilty. [R1304-57-58]

The court asked Defendant if any threats, coercion or [p. 11] improper pressure of any kind been applied to get him to plead guilty. He responded in the negative. [R1304-66-67]

The prosecutor recited the facts that the government would prove beyond a reasonable doubt if the case proceeded to trial. [R1304-58-60] Defendant acknowledged that the facts recited by the prosecutor were true. [R1304-60]

Accordingly, the record below clearly reflects that the Defendant was fully informed and knowing of his constitutional rights, and the effect of their waiver by his plea of guilty. The record also clearly supports the conclusion that waiver was voluntary. Thus, there is no merit to a claim of an unknowing and/or involuntary waiver of the Defendant's rights.

II.
WHETHER FEDERAL RULE OF CRIMINAL PROCEDURE 11 SUBSTANTIALLY FOLLOWED DURING PLEA COLLOQUY.

Federal Rule of Criminal Procedure 11 provides:

> (c) Advice of Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect or any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, [p. 12] when applicable, that the court may also order the defendant to make restitution to any victim of the offense; ....

In the case at bar, the district court advised Defendant of the nature of the charge to which he entered a plea of guilty. [R1304-45-65] The Defendant advised the court that no force, intimidation or threats were applied to induce him to plead guilty. [R1304-66-67] He acknowledged that he understood the nature of the charge he was pleading and to penalty. [R1304-64-67] The court substantially complied with Rule 11. [p. 13]

CONCLUSION

Pursuant to *Anders v. State of California*, 386 U.S. 738 (1967), the undersigned counsel requests this Court's permission to withdraw as counsel of record and to afford the Defendant the opportunity, if he so desires, to supplement this appeal raising any issue which he contends have merit. Counsel certifies that he has forwarded the Defendant a copy of the brief, together with a letter advising him of his right to supplement the brief, if he so chooses.

Respectfully submitted,

/s/ James A. Hernandez
James A. Hernandez
Fla. Bar No. 0871303
1905 Atlantic Blvd.

Jacksonville, Florida 32207
(904) 396-7466/ Fax: (904) 396-9733

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing have been furnished to Susan H. Raab 300 North Hogan Street, Suite 700, Jacksonville, Florida 32202, by United States Postal Service this 3 Oct 03. I also certify that on 28 Sep 03 a copy of this brief was sent via PDF Format to the 11th Cir. Court of Appeals.

/s/ James A. Hernandez
James A. Hernandez

8 October 2003 Clerk's transmittal document regarding transcripts (and updated case number)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Office of the Clerk
300 North Hogan Street
Suite 9-150
Jacksonville, Florida 32202
(904) 549-1900
www.flmd.uscourts.gov

Sheryl L. Loesch, Clerk
Eric A. Hogue, Jacksonville Division Manager

DATE:	October 8, 2003
TO:	Clerk, U.S. Court of Appeals for the Eleventh Circuit
U.S.D.C. Case No.:	3:00-cr-262-J-20A
Style of Case:	UNITED STATES OF AMERICA -vs- DONALD C. FLEMING
U.S.C.A. Case No.:	**03-12283-DD**

Enclosed are documents and information relating to an

appeal in the above-referenced action. Please acknowledge receipt on the enclosed copy of this letter.

- Complete Record on Appeal:
  5 Volumes of Pleadings
  24 Volumes of Transcript
  1 Presentence Investigation Reports

- Certificate of Readiness with certified copies of indexed District Court Docket Sheet [11 th Circuit Only]

SHERYL L. LOESCH, CLERK
By: Sandra Gatz, Deputy Clerk

Enclosure(s)

8 October 2003 Clerk's transmittal document regarding Certificate of Readiness

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Office of the Clerk
300 North Hogan Street
Suite 9-150
Jacksonville, Florida 32202
(904)549-1900
www.flmd.uscourts.gov

Sheryl L. Loesch
Clerk

Eric A, Hogue
Jacksonville Division Manager

October 8, 2003

CERTIFICATE OF READINESS
OF RECORD ON APPEAL

U.S. District Court Case Number: 3:00-cr-262-J-20A
Style of Case: United States of America -vs-

DONALD C. FLEMING
U.S.C.A. Case Number: 03-12283-DD

Pursuant to Federal Rules of Appellate procedure 11(c), the Clerk of the United States District Court for the Middle District of Florida hereby certifies that the record is complete for purposes of this appeal. The record, including the transcript of parts thereof designated for inclusion and all necessary exhibits, consists of:

Complete Record on Appeal:
- 5 Volume(s) of Pleadings
- 24 Volume(s) of Transcript
- 1 PSI [Sealed]

SHERYL L. LOESCH, CLERK
By: Sandra Gatz, Deputy Clerk

11 February 2004 Fleming's First Amended Notice of Appeal

FILED 2004 FEB 11 P 12:39 [?]
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
v.	§	Case No. 3:00-cr-262-J-
	§	20HTS
DONALD C. FLEMING	§	

FIRST AMENDED NOTICE OF APPEAL

Under the general rule of nunc pro tunc application of amended pleadings, notice is hereby given that Don Fleming, a defendant in the above-captioned case, hereby appeals to the United States Court of Appeals for the 11th Circuit from the final order of this Court with respect to him which order "sentences" DONALD C. FLEMING. This final order with respect to him was entered on or not long after 28 April 2003.

DONALD C. FLEMING INTENDS TO PURSUE HIS DIRECT APPEAL PRO SE, WITHOUT ANY ATTORNEYS, WITHOUT ANY RIGHT TO REPRESENTATION, AND BY MEANS OF SELF-REPRESENTATION.

/s/ Don Fleming
Don Fleming
c/o 1012 Crestdale Street
Jacksonville [32211]
Florida

Certificate of Service

By my signature below, I certify that on this the 9th day of February, 2004, I have served a copy of this document on all parties directly affected by this document, with a complimentary copy to the Eleventh Circuit.

/s/ Don Fleming
Don Fleming

1362

11 February 2004 Clerk's transmittal document regarding Fleming's First Amended Notice of Appeal

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Office of the Clerk
300 North Hogan Street
Suite 9-150
Jacksonville, Florida 32202
(904) 549-1900
www.flmd.uscourts.gov

Sheryl L. Loesch, Clerk
Eric A. Hogue, Jacksonville Division Manager

DATE: February 11, 2004
TO: Clerk, U.S. Court of Appeals for the Eleventh Circuit
U.S.D.C. Case No.: 3:00-cr-262-J-20HTS
Style of Case: UNITED STATES OF AMERICA
-vs-
DONALD C. FLEMING
U.S.C.A. Case No.: 03-122$3-DD

Enclosed are documents and information relating to an appeal in the above-referenced action. Please acknowledge receipt on the enclosed copy of this letter.

- Honorable Harvey E. Schlesinger, United States District Judge appealed from.
- Appeal filing fee not applicable.
- Copy of FIRST AMENDED Notice of Appeal (doc. #1362), certified copy of docket entries, judgment and/or Order appealed from. Opinion was not entered orally.

- Dates of other appeals: 4/30103

SHERYL L. LOESCH, CLERK
By: Sandra Gatz, Deputy Clerk

Enclosure(s)

Numerics Numerics conjured for Fleming

Donald C. Fleming:
SSN: 077-34-4838

	Calendar Year		
	1993	1994	1995
Income	$638,702	$685,693	$628,114
Expenses	($471,021)	($504,357)	($407,378)
Net Income	$167,681	$181,336	$220,736
Income tax	$51,249	$56,255	$71,286
Self-employment tax	$11,057	$12,370	$13,501
Total tax	$62,306	$68,625	$84,787
Force Back-up Withholding	($13,960)	($45,299)	($56,825)
Tax Liability (Form 1040)	$48,346	$23,326	$27,962
Employment taxes			
Form 941	$67,252	$91,332	$59,958
Form 940	$7,030	$5,960	$1,241
Total tax Due	**$122,628**	**$120,618**	**$89,161**

	1996	Total
Income	$554,390	$2,506,899
Expenses	($444,783)	($1,827,539)
Net Income	$109,607	$679,360
Income tax	$27,897	$206,687
Self-employment tax	$10,710	$47,638
Total tax	$38,607	$254,325
Force Back-up Withholding	($19,145)	($135,229)
Tax Liability (Form 1040)	$19,462	$119,096
Employment taxes		
Form 941	$70,627	$289,169
Form 940	$5,777	$20,008
Total tax Due	**$95,866**	**$428,273**

Numerics conjured for Arnold

Al Arnold:

	4/1/96 to 12/31/96	1/1/97 to 12/31/97	1/1/98 to 10/5/98
Income	$415,793	$547,194	$626,254
Expenses	($333,587)	($422,732)	($327,832)
Net Income	$82,206	$124,462	$298,422
Total tax	$28,955	$44,467	$108,703
Force Back-up With-holding	$14,359	$0	$0
Tax Liability (Form 1040)	$14,596	$44,467	$108,703
Employment taxes due			
2Q96 (941)	$22,408		
2Q96 (940)	$1,380		
3Q96 (941)	$17,585		
3Q96 (940)	$1,015		
4Q96 (941)	$6,929		
4Q96 (940)	$503		
Total tax Due	**$64,416**	**$44,467**	**$108,703**

	Total
Income	$1,589,241
Expenses	($1,084,151)
Net Income	$505,090
Total tax	$182,125
Force Back-up With-holding	($14,359)
Tax Liability (Form 1040)	$167,766
Employment taxes due	
2Q96 (941)	$22,408
2Q96 (940)	$1,380
3Q96 (941)	$17,585
3Q96 (940)	$1,015
4Q96 (941)	$6,929
4Q96 (940)	$503
Total tax Due	**$217,586**